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# THE ONTARIO MUNICIPAL BOARD: PLANNING AND ZONING CASES

By MARIE CORBETT\* \*\*

This paper deals with reported decisions of the Ontario Municipal Board rendered pursuant to its planning and zoning jurisdiction. Reference is had to the kinds of matters considered by the Board and the Board's power to re-hear its own decisions is discussed.

## A. THE ADMINISTRATIVE PROCESS

In Canada, the eleven Parliaments are the supreme legislative authorities, the only limitation being the jurisdictional spheres delineated in the *British North America Act*.<sup>1</sup> The constitutionality of a law is tested by reference to the class of subjects enumerated in the *B.N.A. Act*; provided the *B.N.A. Act* jurisdiction exists, the legislature may be as arbitrary as it wishes.

Although theoretical arbitrariness is inherent in such a power, legislatures, as a matter of practice, have regard to public policy and provide for 'methods of intervention' by other agencies with some measure of due process. These methods can be broadly referred to as administrative law. It is through the administrative machinery that the social policy goals of the legislature are accomplished and regulated. Statutory law may be contrasted with judicial law or common law, although statutes may include recourse to the judicial system as a method of effecting the policy of statute. Common law is judge-made law, where an individual has recourse to litigation to assert a right or to limit a possible liability.

Litigation is pathological in the sense that recourse is had to courts when all other social means fail to provide the redress sought. One sues because one is aggrieved and one asserts that another is legally responsible for that alleged injustice. In addition, an individual may sue because it is the only forum in which it is possible to obtain the required relief, *e.g.*, the dissolution of a marriage by divorce in a court of law. The applicant or plaintiff having recourse to the judicial forum obviously must suffer some wrong or, more broadly put, have a substantial interest in the matter asserted. *A* cannot sue

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\*\* Readers are cautioned that the remarks and editing of cases to follow are the personal opinions and selections of the author and in no way may be taken to represent the views of the OMB save as declared by actual decisions. In this regard readers are reminded that while the Board values consistency, the doctrine of *stare decisis* does not apply to Board decisions.

<sup>1</sup> 30-31 Vict, c-3.

for *B*'s personal injuries regardless of how morally or socially indignant *A* may be. *A* is not a party and cannot be a party because *A* not being legally aggrieved, has no standing, or status, to sue.

Judge-made law is precedent-setting in that like cases will be decided alike. Judges determine the facts in issue and apply the relevant laws to those facts. Key ingredients of court-made decisions are status to sue, a *lis* between parties and the application of law. With these ingredients, one has the full benefit of court procedure in obtaining redress.

Court procedure,<sup>2</sup> developed over centuries, requires that no step in the proceedings be taken without notice to the parties to the dispute. Moreover, the litigants are entitled to seek the advice of and be represented by counsel of their choice, and are given the opportunity to prepare their own cases with reasonable knowledge of the case they will have to meet. Each party has the authority to compel the attendance of witnesses and the production of necessary documents. Proceedings are conducted publicly, in the presence of the parties and each party is accorded the right to examine his own witnesses and to cross-examine those of the other party. Other procedural safeguards include the rules regarding the admissibility of relevant evidence and requiring that the decision be based on facts proven at the hearing. Rights and liabilities as determined in a court of law have the benefit of this procedure, which is particularly suitable to the adjudication of a *lis inter partes* requiring the application of rule of law.

The sophisticated court procedures, often taken as ideal procedural requirements for any forum, may be inappropriate for individuals or groups dealing with administrative agencies. These bodies may or may not determine an issue between parties but will make, for example, a decision as to whether a sand and gravel pit ought to be permitted in a given location or whether a liquor licence ought to issue. Administrative bodies deal with polycentric issues, issues involving not only some determination of fact, but also the application of policy,<sup>3</sup> which need not be adduced in evidence.

Bodies with administrative jurisdiction have varying procedures governing recourse to them. To safeguard against arbitrariness of decision-making, requirements of procedural fairness are imported into administrative decision-making through the doctrine of natural justice. Natural or procedural justice involves the determination of whether one is entitled to notice of an administrative action and whether one who objects to such action is entitled to a hearing. Not all administrative decisions are subject to the rules of natural justice. However, where the result of an administrative decision is to affect a status or a right of an individual or where the proceedings resemble a '*lis*' between parties, the rules of procedural fairness will apply. Where a decision is purely ministerial or non-judicial, the doctrine is not applicable.

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<sup>2</sup> *Ontario Royal Commission Inquiry into Civil Rights* (Toronto: Queen's Printer, 1968) at 49-50.

<sup>3</sup> The word policy is used in its wide sense and not with the legalistic meaning associated with the judicially developed doctrines of 'public policy'.

Ontario has codified procedural requirements in *The Statutory Powers Procedure Act*.<sup>4</sup> This Act applies to boards and tribunals exercising a "statutory power of decision" where the tribunal is required by statute or otherwise by law to afford an opportunity for a hearing. A statutory power of decision is defined in the Act<sup>5</sup> and includes a statutory power to make a decision deciding or effecting legal rights. In such a case, the individual affected by the decision will be entitled to notice and hearing. When these procedural requirements are complied with and the administrative body is acting within the jurisdiction given to it by the legislature, the court will not interfere with the policy applied by the body, even if the court may have come to a different conclusion.

## B. THE ONTARIO MUNICIPAL BOARD

### 1. Jurisdiction

The Ontario Municipal Board is established pursuant to *The Ontario Municipal Board Act*<sup>6</sup> and was first established in 1932 as the successor to the Ontario Railway and Municipal Board. Its legislative roots go back to 1897.<sup>7</sup>

The Board is an administrative tribunal exercising power in many areas. The Board in addition to its powers under its enabling Act has considerable jurisdiction under many other statutes, particularly *The Planning Act*,<sup>8</sup> *The Assessment Act*,<sup>9</sup> *The Municipal Act*,<sup>10</sup> *The Secondary Schools and Boards Act*,<sup>11</sup> and *The Public Transportation and Highway Improvement Act*.<sup>12</sup> The Royal Commission Inquiry into Civil Rights noted that in its research it was quite unable to say it had located all of the powers of the Board.<sup>13</sup> In 1974, the Board conducted hearings on 2,142 applications and appeals and a total of 6,695 orders of the Board were prepared and issued during the year. It received 2,365 applications for approval of restricted area (zoning) by-laws, 92 applications for approval of official plan amendments and 13 applications for approval of proposed plans of subdivision.<sup>14</sup> The Board is composed of approximately 26 full-time members appointed by the Lieutenant-Governor in Council. The members travel throughout the province to hold hearings. Two members of the Board form a quorum unless one member is authorized by the Chairman.<sup>15</sup> Two members normally hear zoning and plan-

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<sup>4</sup> S.O. 1971, c. 47, as amended.

<sup>5</sup> *Id.*, s. 1(d).

<sup>6</sup> R.S.O. 1970, c. 323, as amended.

<sup>7</sup> *Supra*, note 2 at 2013.

<sup>8</sup> R.S.O. 1970, c. 349, as amended.

<sup>9</sup> R.S.O. 1970, c. 32, as amended.

<sup>10</sup> R.S.O. 1970, c. 284, as amended.

<sup>11</sup> R.S.O. 1970, c. 425, as amended.

<sup>12</sup> R.S.O. 1970, c. 201, as amended.

<sup>13</sup> *Supra*, note 2 at 2015.

<sup>14</sup> 69th Annual Report of the OMB at 6.

<sup>15</sup> *Supra*, note 6, ss. 12, 13.

ning applications and the members who conduct the hearing render the decision.

*The Ontario Municipal Board Act* sets out the general jurisdiction of the Board. Section 33 gives the Board all the powers of a court of record. Section 34 provides that the Board, as to all matters within its jurisdiction under the Act, has authority to hear and determine all questions of law or of fact. Notwithstanding the power of the Board to determine matters of law, the Board shall not approve any municipal affair or matter when the same issue is called in question "in any pending action or proceeding or by which it is sought to quash any by-law or a municipality relating thereto".<sup>16</sup> As a matter of practice, the Board does not deal with any matters when the same issues are the subject matter of existing litigation. The Board is given the same "powers, rights and privileges" as are vested in the Supreme Court in procedural matters and in enforcing its orders.<sup>17</sup> In addition, broad powers of inquiry and rule-making are given to the Board under its enabling Act, although these powers are not generally invoked.<sup>18</sup>

Under *The Planning Act*,<sup>19</sup> the Board has jurisdiction in official Plan references and zoning by-law approvals. It is useful to compare the Board's jurisdiction in Official Plan and zoning matters. The Official Plan is defined in *The Planning Act* as:

. . . a program and policy, or any part thereof, covering a planning area or any part thereof, designed to secure the health, safety, convenience or welfare of the inhabitants of the area, and consisting of the texts and maps, describing such program and policy, approved by the Minister from time to time as provided by this Act.<sup>20</sup>

Councils of designated municipalities must appoint a planning board,<sup>21</sup> which is a body corporate. Its function, as provided in the Act, is to investigate and survey the physical, social and economic conditions in relation to the development of the planning area. A plan is ultimately prepared for recommendation to the local council. In the preparation of the plan, the Planning Board is required by statute to hold public meetings and publish information so as to obtain the participation and co-operation of the "inhabitants" of the planning area.<sup>22</sup>

The council of the municipality may adopt the plan or adopt it with amendments;<sup>23</sup> upon adoption, the plan must be submitted by council to the Minister of Housing.<sup>24</sup> The Minister may refer the plan to any government department and may make modifications after consultation with the municipal

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<sup>16</sup> *Id.*, s. 56.

<sup>17</sup> *Id.*, s. 37.

<sup>18</sup> *Id.* See, ss. 36, 40, 46, 47, 48.

<sup>19</sup> *Supra*, note 8.

<sup>20</sup> *Id.*, s. 1(h).

<sup>21</sup> *Id.*, s. 3.

<sup>22</sup> *Id.*, s. 12.

<sup>23</sup> *Id.*, s. 13.

<sup>24</sup> *Id.*, s. 14.

council.<sup>25</sup> Upon ministerial approval the plan becomes the Official Plan of the planning area. It is to be noted that there is no statutory requirement that individual notice be given to owners of lands affected by an Official Plan.

Such Official Plan designates lands for certain purposes but does not have the force of law. It is a policy statement which zoning by-laws ideally implement. The Official Plan is a policy guide but does not of itself prohibit or permit uses of land. This function is performed by the zoning by-law. Where an Official Plan is in effect no public work may be undertaken, and no by-law passed, for any purpose that does not conform with the Plan.<sup>26</sup>

The Ontario Municipal Board has no originating jurisdiction in Official Plan matters; its jurisdiction arises upon a referral. *The Planning Act* gives the Minister of Housing a discretion to refer any part of the plan to the Board. However, where any person requests the Minister to refer any part of the plan to the Board prior to its approval, the Minister is obliged to do so unless the request is not made in good faith or is frivolous or is made only for the purpose of delay.<sup>27</sup> Upon such referral, the Board conducts a hearing as to the designation of the lands in question and the approval of the Board has the same force and effect as if it were the approval of the Minister.

In addition, an Official Plan matter may be referred to the Board pursuant to s. 17 of *The Planning Act*. Any person may request the council to initiate an amendment to the Official Plan. Where council either refuses to propose the amendment or fails to propose the amendment within thirty days from the receipt of the request, such person may then request the Minister to refer the proposal to the Board. The Minister is given the discretion to refer the matter or refuse the request. Section 17 does not appear to confine such requests to applicants concerning their own properties.

Reference of Official Plans may also be made pursuant to s. 44 of *The Planning Act*. When, under the Act, the approval or consent of the Minister is applied for, the Minister may, and upon application therefore shall, refer the matter to the Board<sup>28</sup> subject to the same discretion where the request is frivolous or made to cause delay. However, this provision does not apply to draft approval of a plan of subdivision.<sup>29</sup> But where an owner of land or the municipality in which land is situated is not satisfied with conditions attached by the Minister to a draft approval, he or it may require such condition or conditions to be referred to the Board.<sup>30</sup>

Unlike the provisions for references of official plans and plans of subdivision, no zoning by-law comes into force without the approval of the

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*, s. 19. See also, ss. 20, 35(17), (28).

<sup>27</sup> *Id.*, s. 15(1).

<sup>28</sup> *Id.*, s. 44(1).

<sup>29</sup> *Id.*, s. 44(3).

<sup>30</sup> *Id.*, s. 33(7).

Board.<sup>31</sup> Zoning by-laws are passed pursuant to s. 35(1) of *The Planning Act* and councils may prohibit the use of land and the erection or use of buildings except for such purposes as may be set out in the by-law. Before approving any by-law, the Board must hold a public hearing "for the purpose of inquiring into the merits of the application and of hearing any objections that any person may desire to bring to the attention of the Municipal Board".<sup>32</sup> The Board may direct council to give notice of such application<sup>33</sup> and may direct the notice to state that anyone objecting to the by-law file an objection within a prescribed time.<sup>34</sup> Where notice of the application is given and no notice of objection is filed with the clerk within the prescribed time, the Board may approve the by-law without holding a public hearing or, if the Board considers the objection or objections to be insufficient, the Board may require a public hearing.<sup>35</sup>

An applicant, other than a municipality, may also apply to council for an amendment to a zoning by-law. If the application is refused, or if the council does not make a decision within one month of the receipt of the application, the applicant may appeal as a right to the Municipal Board. The Board has the power to direct that the by-law be amended by council.<sup>36</sup> However, in dealing with this section of *The Planning Act*, the Board has held this to be an extraordinary power, which is to be exercised with extreme caution. "It is a power not possessed by any court. If ever there is a situation where judicial self-restraint should be exercised, it is when this government appointed Board is asked to overrule the considered decision of a democratically elected council and compel them to pass a by-law."<sup>37</sup>

In another s. 35(22) application, the Board stated: "[T]here must be very convincing planning evidence to support the change in land use, bearing in mind that both the local planning Board and council have rejected the application."<sup>38</sup> The Board has articulated when it will interfere with the decision of council as follows: "The Board should decline to interfere with the exercise by elected representatives of the discretion given to councils, except when it is shown that their action is clearly not for the greatest common good, that it creates an undue hardship, that some private right is unduly interfered with or denied, that they have acted arbitrarily on incorrect information or advice or otherwise improperly."<sup>39</sup>

There is, in the planning area, some overlap between the jurisdiction

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<sup>31</sup> *Id.*, ss. 33(9), (10).

<sup>32</sup> *Id.*, s. 35(12).

<sup>33</sup> *Id.*, s. 35(11).

<sup>34</sup> *Id.*, s. 35(13).

<sup>35</sup> *Id.*, s. 35(14).

<sup>36</sup> *Id.*, s. 35(22).

<sup>37</sup> *Claverley Investments Ltd. v. East York* (1974), 3 O.M.B.R. 356; and see *Wuthering Heights Ltd. v. Town of Oakville* (1973), 1 O.M.B.R. 292.

<sup>38</sup> *Gulf Oil Canada Ltd. v. Township of Augusta* (1973), 1 O.M.B.R. 203.

<sup>39</sup> *Sarnia Association for Mentally Retarded v. City of Sarnia* (1974), 2 O.M.B.R. 397 at 399.

of the Minister and the matters that are brought before the Board. Draft plans of subdivision are submitted to the Minister for approval; however, the Minister may, in granting approval, "impose such conditions . . . as in his opinion are advisable".<sup>40</sup> Where approval of a zoning by-law is made a condition of draft approval of a plan of subdivision, the Board has stated:

. . . although this Board does not in any way attempt to question the matters within the jurisdiction of the Minister when giving draft approval, it is cognizant of the fact that some of the matters considered by the Minister overlap in the area of planning. The Board therefore must take into consideration in determining whether or not a zoning by-law should or should not be approved some of the matters that have already been considered by the Minister.<sup>41</sup>

The jurisdiction of the Board on zoning applications derives from s. 35 of *The Planning Act*. When approval of a draft plan of subdivision is made conditional on approval of a zoning by-law, the Board deals with the application under s. 35.<sup>42</sup> Similarly, the Board has stated that it will not on a re-zoning application "review what the Minister has done on another matter".<sup>43</sup> In *Re City of London By-law C.P.*, the Board stated:

The Board would not ordinarily give regard again to those matters which have been dealt with by the Minister unless there is some evidence of changed circumstances or of new and significant information suggesting that the re-zoning application is premature and should be refused or that it should be adjourned until the Minister has considered the additional information relating to the plan of subdivision and the adequacy of services.<sup>44</sup>

## 2. *The Hearing*

### (a) Procedure

*The Ontario Municipal Board Act* provides that the Board may make general rules regulating its practice and procedure and regard should be had to Part VI of the Board's Act. Regulation 637<sup>45</sup> contains the Board's procedure on matters before it. These rules provide that any matter not set out therein shall "be followed as far as they are applicable" by the Rules of Practice under *The Judicature Act*. Regulation 637 contains 26 rules which are general in nature and provide for the form of applications, notice to opposite parties, production of documents, and the like. The Regulation provides that "any party" may give a party notice to produce documents at the hearing. The discovery of documents or persons is not as of right but may be made upon application to the Board by notice of motion. Section 24 of the Regulation provides that no proceeding before the Board shall be defeated or affected by any technical objection or by any objection based upon defects in form.

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<sup>40</sup> *The Planning Act*, *supra*, note 8, s. 33(5).

<sup>41</sup> *Re Regional Municipality of Sudbury By-law 74-12* (1975), 4 O.M.B.R. 410 at 411.

<sup>42</sup> See *Re Town of Aurora By-law 1920/71* (1973), 1 O.M.B.R. 160.

<sup>43</sup> *Re Twp. of Caledon By-law 1584* (1974), 2 O.M.B.R. 366.

<sup>44</sup> (1974), 3 O.M.B.R. 275 at 275-6.

<sup>45</sup> R.R.O. O. Reg. 637.



Regulation 637 does not define party but defines the "applicant" as including "a complainant and any person or corporation applying to the Board to hear and determine any matter or thing". Under *The Statutory Powers Procedure Act*, parties are "the persons specified as parties by or under the statute under which the proceedings arise or if not so specified, persons entitled by law to be parties to the proceedings".<sup>46</sup> Section 10 of this Act entitles a party to:

- (a) be represented by counsel or an agent;
- (b) call and examine witnesses and present his arguments and submissions;
- (c) conduct cross-examinations of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence.

In proceedings before the Board, the question of who is a party, and therefore entitled to exercise the rights provided by s. 10 of *The Statutory Powers Procedure Act*, is a complex one. Whether a person is entitled by law to be a party involves the question of *locus standi*. In general, the courts consider that to be a party or to be "aggrieved" a person must be deprived of, or refused, something to which he was legally entitled or be subjected to a legal burden.<sup>47</sup> On an Official Plan reference or an application for rezoning, the applicant, whether an individual or the municipality, is clearly a party. However, at a Board hearing concerning planning and zoning matters, adjoining ratepayers and ratepayer associations usually attend; they may or may not give evidence. Without embarking on a legal discussion of whether such notified and interested members of the public are "parties" or "aggrieved" the question has great practical significance. If, for example, 50 members of the public attend a hearing for the approval of a by-law, does each one have the right to cross-examine witnesses? Does each member of the public who gives evidence have the right to cross-examine other members of the public? As a matter of practice, the Board does permit ratepayers to cross-examine witnesses opposed in interest or permits such questions to be asked through the Board. Board practice in these matters may vary with the nature of the issues and with the number of persons desiring to participate in the proceedings. In any event, and without question, all persons and associations desiring to give evidence are encouraged to do so.

It has sometimes been stated that ratepayer associations may not appear before the Board.<sup>48</sup> This misconception derives from an erroneous interpretation of the *Bedford Park Residents Association* case.<sup>49</sup> There it was held that the Association could not appeal a decision pursuant to s. 42 of *The Planning Act* since the Association was not a legal person. The section in question

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<sup>46</sup> *Supra*, note 4, s. 5.

<sup>47</sup> S. A. de Smith, *Judicial Review of Administrative Action*, (3d ed. London: Stevens, 1973) at 364, 365.

<sup>48</sup> *E.g.*, Bureau of Municipal Research, *Civic Affairs*, Jan. 1975 at 29.

<sup>49</sup> O.M.B. file A73874.

gives a right of appeal to a "person". However, the *Bedford Park* case clearly stated that the Association may give evidence and such is the practice of the Board. Certainly from the point of view of preserving or obtaining rights of appeal, a prudent association will ensure that such appeal is made by a person in law.

(b) Onus

Onus or the burden of proof has two meanings: (1) establishing a case, and (2) introducing evidence. The *onus probandi* in the second sense rests upon the party who would fail if no evidence at all, or no more evidence, as the case may be, were given on either side. Before evidence is adduced, the onus rests upon the party asserting the affirmative of the issue. After the evidence is adduced, the onus rests upon the party against whom the tribunal would give judgment if no further evidence were adduced.<sup>50</sup> Onus as a determining factor only arises when the judge or jury finds the evidence so evenly balanced that it can come to no sure conclusion. Thus, where the trier of fact can come to a conclusion on the evidence, this concept of onus is not relevant and need not be further considered.<sup>51</sup>

The use of the word 'tribunal', *supra*, refers to the judge and jury and onus is not an issue if the decider can come to a conclusion on the evidence. The concept of onus as it applies to administrative tribunals may have no place whatsoever. An administrative tribunal may be required to exercise an independent judgment on matters that are brought before it and may consider matters of public policy. The Board has stated:

There is no such thing as an onus resting upon any interested party in administrative matters of this kind before the Board. It is the responsibility of the Board to consider all of the evidence and argument and to decide the case upon its merits without the intrusion of any onus. As in all matters of this kind there is a balance between the public and private interest and the evidence submitted in each individual case should determine the decision.<sup>52</sup>

This view is confirmed by the judicial decisions which have considered the role of the Municipal Board in approving zoning by-laws:

Its [OMB] sole function is to consider whether or not a by-law is to receive its approval having in mind, the general interest and the intent of the Act under which the by-law was passed . . . the Board was thus entitled to consider not the validity of the by-law but whether the by-law represented good and desirable rezoning in the municipality and on the street in question and if it was in accordance with a policy of furthering the health, safety, convenience and welfare of the inhabitants of the district.<sup>53</sup>

In *Re Cloverdale Shopping Centre Ltd. et al. v. Township of Etobicoke*, a decision of the Ontario Court of Appeal, it was held:

. . . the decision to be made transcends the interests of the immediate parties . . . .  
The Minister of the Board is not deciding a *lis* in the sense that the issue is con-

<sup>50</sup> Phipson, *On Evidence*, (10th ed. London: Sweet & Maxwell, 1973) at 92.

<sup>51</sup> *Rex v. Gooderham & Worts Ltd.* (1928), 62 O.L.R. 218.

<sup>52</sup> *Re City of Niagara Falls By-law 72-107* (1973), 1 O.M.B.R. 547 at 550.

<sup>53</sup> *Re Township of North York By-law* (1960), 24 D.L.R. (2d) 12 at 20; (1960), O.R. 374.

fined to those for and against the proposal but he on it has to consider the safety, welfare and convenience *i.e.*, the interests of the public in the municipality affected. . . . The decision is not a decision upon the objections of the proposal; those objections may be and frequently are of validity and importance. They may however be overruled upon the larger considerations of administrative policy.<sup>54</sup>

In *Johnson and Co. (Boulders) Ltd. v. Ministry of Health*, Lord Greene, M.R., said in part:

. . . it is completely wrong to treat the controversy between objector and local authority as a controversy that covers the whole of the ground. . . . It would be impossible for an objector to attempt to get the decision set aside on the grounds that the evidence at the inquiry or the evidence put before the Minister in his quasi-judicial capacity was insufficient to support his decision to confirm the order.<sup>55</sup>

(c) Factors Considered by the Board on Official Plan References and Zoning By-Law Hearings<sup>56</sup>

The Board considers many factors in its determination of sound planning policy. For purposes of discussion, these can be broadly classified as matters involving a consideration of feasibility, impact, and public interest.

(i) Feasibility

Before approving a designation on an Official Plan or a zoning by-law, the Board must satisfy itself that the proposed designation or land use is appropriate in the circumstances. To determine whether the land is suitable for the requested purpose involves a consideration of such matters as topography, servicing, including sanitary and storm sewers, water and drainage, parking requirements, the effect of and generation of traffic access and the availability of schools and community amenities.

In *City of London Planning Area and Grant*,<sup>57</sup> the Board, in its interim decision, did not approve an application by an owner to designate lands from open space to high density residential, in part because the topography was unique and problems existed concerning services and access. However, in *Re Borough of Etobicoke Official Plan and By-laws 2552 & 2553*,<sup>58</sup> the Board approved an ice arena use on lands with a floodplain, having been satisfied that the flood-proofing measures would result in no risk to property or human life.

Where existing services are at a saturation point, and there is no assurance that the proposed use will not tax the available services, the Board has refused its approval.<sup>59</sup> Thus, for example, an application for zoning to

<sup>54</sup> (1966), 57 D.L.R. (2d) 206 at 216-17; (1966), 2 O.R. 439 at 449-450.

<sup>55</sup> [1947] 2 All. E.R. 395 at 399-400.

<sup>56</sup> Shopping Centre cases are generally excluded from this discussion.

<sup>57</sup> Unreported R. 73 1149 (36) P 94 46 R 565 November 6, 1975.

<sup>58</sup> (1974), 2 O.M.B.R. 402.

<sup>59</sup> See, for example, *Re Regional Municipality of Sudbury By-law 74-12*, (1975), 4 O.M.B.R. 411, where the Board did not approve a by-law, not being satisfied as to the adequacy of the storm drainage. The Board stated at 412, "To put it another way, it seems an effort in futility to zone a property for a use unless there is some reasonable assurance that the property is going to be able to be put to that use after the zoning has taken effect."

permit a take-out restaurant was refused on considering the intensity of traffic and the congested intersection.<sup>60</sup> However, where a need for a particular use is established, the Board may grant its approval notwithstanding the fact that legitimate objections are raised. In *Re City of London By-Law CP-374 (ds) - 174*, the Board approved zoning for a firehall for which a need was established. The objections concerned traffic and the aesthetics of the building. In commenting on the latter, the Board noted:

It is also quite apparent from an aesthetic sense that the form of the building may not satisfy everyone. This, of course, is true of any building, including single family homes which accounts for the wide variety of architectural forms which are employed.<sup>61</sup>

(ii) Impact

The Board determines what impact, if any, the proposed use will have on existing and future uses. Impact is a general term and has included consideration of the adjoining uses, the degree of integration or intrusion and its effect, the character of the neighbourhood, density, height, shadowing effect, the effect on land values and assessment, the creation of non-conforming uses, and environmental impact.

A proposed use which would result in a complete alteration in the character of the neighbourhood has not been approved.<sup>62</sup> The Board has refused to approve zoning to permit high rise apartment development in predominantly residential areas. Where a twenty-three storey apartment building was proposed in close proximity to residences, the Board refused its approval and observed that the owners and other residents in the area were not obliged to accept this intrusion which would change the character of the area.<sup>63</sup> However, in *Re Scarborough Official Plan*,<sup>64</sup> the Board approved high rise development where the neighbourhood had old homes, was ripe for development and was adjacent to schools, parks, and the subway.

The Board has also had to consider whether the intrusion of an urban-style development is appropriate in a predominantly rural area. This question has arisen on applications to permit mobile home parks. On one such application, the Board refused its approval having found that it was an injection of an urban use in a rural area. Although the Board considered the popularity of this type of housing and the fact that a great many persons appeared in support of the application, it was found to be an unreasonable intrusion.<sup>65</sup>

In considering the compatibility of a proposed use, the Board has stated that where a proposed change contemplates the introduction of a new use which is radically different from the established uses, "it must be clearly

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<sup>60</sup> *Re City of Cambridge By-law 275* (1975), 4 O.M.B.R. 240.

<sup>61</sup> (1974), 3 O.M.B.R. 46 at 48.

<sup>62</sup> *Re City of Woodstock OP Amendment and By-law 4560-71* (1975), 4 O.M.B.R. 189.

<sup>63</sup> *Canmer Investments Ltd. v. Borough of Etobicoke* (1973), 1 O.M.B.R. 46.

<sup>64</sup> (1974), 2 O.M.B.R. 199.

<sup>65</sup> *Re Couching P.A.O.P. Amendment No. 6; By-laws 2447-74 and 2415-74* (1975), 4 O.M.B.R. 204.

shown that the new use will have a minimal impact on the established uses . . . ."<sup>66</sup> Similarly, a jug milk store has been found incompatible with the character of an area<sup>67</sup> and lands were not designated residential in an industrial area.<sup>68</sup>

The need for housing has been considered by the Board in other decisions.<sup>69</sup> However, the fact that there is a housing shortage in the area is not necessarily determinative of the application. In *Claverly Investments Ltd. v. Borough of East York*, the Board did not approve multi-family uses in a sound single family residential area. The Board observed:

No doubt there is a housing shortage but if density of sound single family areas is to be increased, it would seem more equitable to permit older homes to be converted into two family units rather than to allow in such areas substantially higher density multi-family projects.<sup>70</sup>

In *Crofton Developments Ltd. v. Borough of Scarborough*, the Board considered this housing shortage and rising rents. There the Board stated: "Developers are to be discouraged from constantly trying to increase their density in the expectation that if they fail they can ultimately appeal to this Board to rescue them from their difficulties."<sup>71</sup> In this case, the developer was allowed a bonus density of fourteen units if the proposed development provided units for senior citizens. This was considered appropriate because of the minimal demand for municipal services made by senior citizens.

A significant decision concerning density is the Etobicoke motel-strip case.<sup>72</sup> There the municipality sought to restrict the density of the development to 35 units per acre while the developer sought 92 units per acre with commercial floor space. The Board approved the higher density but made provision for ten acres to be used for schools and active park purposes. The Board heard evidence concerning land acquisition cost, the existing commercial uses, the potential of the site, the housing demand, the integration, and traffic. The Board viewed the project as a comprehensive self-sufficient and separate community with a population of over 10,000 persons which could provide a broad range of housing types and supporting services and facilities.

The Board has considered evidence of the impact of a proposed use on the mental and physical health of residents from both experts and residents. In *Re City of Windsor Planning O.P. Amendment No. 4, By-law 4462*, the Board did not approve a change from residential to commercial use so as to permit a funeral home. A resident gave evidence as to the negative impact

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<sup>66</sup> *Re Town of Lincoln By-law 73-3* (1974), 3 O.M.B.R. 157.

<sup>67</sup> *Joseph Chiantli Ltd. v. Borough of North York* (1973), 1 O.M.B.R. 243.

<sup>68</sup> *Re City of London O.P.* (1975), 4 O.M.B.R. 6; see also *Re London O.P. Amendment and By-law C.P. 306* (EG)-641 (1975), 4 O.M.B.R. 152.

<sup>69</sup> *Re Town of Walkerton By-law 74-29* (1975), 4 O.M.B.R. 259; *Re Town of Espanola By-law 401* (1974), 2 O.M.B.R. 352.

<sup>70</sup> (1974), 3 O.M.B.R. 356 at 358.

<sup>71</sup> (1975), 4 O.M.B.R. 303 at 305.

<sup>72</sup> *Re Borough of Etobicoke Official Plan Amendment and By-law 3208*, unreported, R 75489, R 75757.

of death, while the expert testified that a change of character of a neighbourhood might affect the social interaction and relationships of the community, but, "The Board must ask whether these views are reasonable and represent normal behaviour of citizens or are they extreme and to be ignored when considering the overall planning of a community. It would appear that over a suitable adjustment period, the average resident would be able to adopt psychologically to a funeral home in the area without undue difficulty. The evidence did not lead us to any other conclusion".<sup>73</sup> The Board then turned to more "traditional planning considerations" and concluded it was not appropriate to introduce, as an initial step, a pocket of a commercial nature of the largely vacant corridor lands in the heart of a stable residential area.

The balancing of competing interests in arriving at an appropriate determination is illustrated by *Malahide Developments Ltd. et al v. City of London*. After hearing evidence of illness by a ratepayer who feared that the Board would approve an apartment building, the Board commented:

. . . the effect of a proposed re-zoning on an adjoining property . . . is of more importance than the effect on the individual who happens to occupy it at the moment. Of even greater importance is the effect on the properties which make up the neighbourhood and the uses to which they are entitled because the interests of the individual (whether he be an objector or a supporter) may have to give way to the interests of the neighbourhood. Similarly a major planning change may require that the special interests of an individual neighbourhood be sacrificed for the common good of the municipality as a whole . . . planning looks to the future rather than at the immediate present, but it still means that planning is for people since property is used of course by and for people.<sup>74</sup>

The Board held that Mrs. Baxter's evidence of illness was neither proper nor relevant. Nonetheless, the Board refused the application stating that there was "...no evidence that the proposed development is of such importance that the interests of the neighbourhood should yield to the common good of the municipality as a whole [and that there was] nothing to suggest that the proposed development would enhance, improve or stabilize the neighbourhood".<sup>75</sup>

A different balancing of interests was arrived at in *Re City of London Official Plan*. In an application for a badly needed parking building and area in association with an adjoining existing hospital, the Board stated: "It appears to me that this is one of those situations where the needs of the entire community must take precedence over the impact of this proposed use on the several houses which are located closest to it".<sup>76</sup>

### (iii) Public Interest

Public interest factors considered by the Board include reasons for the municipal decision, the amount of prior consideration, policy statements in

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<sup>73</sup> (1974), 3 O.M.B.R. 100 at 102-03.

<sup>74</sup> (1973), 1 O.M.B.R. 334 at 337.

<sup>75</sup> *Id.* at 338.

<sup>76</sup> *Re City of London Official Plan 90 and By-law C.P.-306 (cu)-520* (1974), 2 O.M.B.R. 71 at 74.

the Official Plan and other planning documents, future planning, need, available jobs, prematurity, reasonableness, the degree of public participation, government policy, and whether reasonable land use would be sterilized. Where the private interests of residents are to be interfered with, there must be an overriding need demonstrated. The Board has stated:

Before this Board should approve a land use by law to introduce a non-residential use into a single family area which may affect the enjoyment of property and where the residents are largely opposed, there should be some overriding need established.<sup>77</sup>

In that case, the Board refused to approve offices for speech therapists in single family residential zones. Although there was a shortage of qualified speech therapists in Ottawa, the evidence did not satisfy the Board that there was such an overwhelming need so as to require a general amendment in all R. 3 zones. Speech therapists were not considered to be in the same category as physicians in terms of community need. The Board commented in the same decision:

In short, there has not been demonstrated the overriding necessity and expediency of the proposed use so that the private interests of the residents in the neighbourhood should give way to the greater common good of the entire municipality.<sup>78</sup>

Similarly, in *Re Town of Bracebridge By-law 72-35*, the Board refused to approve tourist accommodation in a summer cottage area:

... it is necessary to show some need in an application such as this before a change should be approved and this was not proved by the evidence submitted. In fact, there was no evidence to show why this development should be approved except the wish of the developer.<sup>79</sup>

Prematurity may also be a reason for refusing an application. The Board has, in this regard, considered the adequacy of planning studies, the present need and the present feasibility. Where a need for the proposed use has not been demonstrated, the Board may also decline to approve the application as being premature.<sup>80</sup>

In *Re Borough of Etobicoke By-law 2839*,<sup>81</sup> the Board adjourned a police communications tower application to allow the applicant to produce better and further evidence as to the availability and advisability of alternative sites whether on public or private land. However, where the effect of adjourning an application is to leave the lands unzoned, the Board may grant approval. Thus, in *Re Township of Osgoode By-law 16-1971*,<sup>82</sup> the Board gave its approval, notwithstanding the fact that a regional planning study had not been completed at the time of the application. Since there was no assurance that such study would be completed in the near future, the Board ap-

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<sup>77</sup> *Re City of Ottawa By-law 244-71* (1974), 3 O.M.B.R. 173.

<sup>78</sup> *Id.* at 176.

<sup>79</sup> (1974), 2 O.M.B.R. 151 at 153.

<sup>80</sup> See *Jones v. Municipality of Shuniah* (1974), 3 O.M.B.R. 106 where an application for mobile homes was refused because of prematurity; also, *Re Township of West Nissouri By-laws* (1975), 4 O.M.B.R. 344.

<sup>81</sup> (1974), 3 O.M.B.R. 122.

<sup>82</sup> (1974), 2 O.M.B.R. 426.

proved the application noting that to refuse would leave the lands free of any planning regulations.

The Board considers that matters coming before it have been carefully studied by the appropriate bodies and has placed reliance on the collective wisdom of those making the decision.<sup>83</sup> Since a zoning by-law should provide residents with a degree of certainty so that they may order their affairs accordingly, evidence that a municipality has given careful consideration to the proposed by-law will be taken into account by the Board.<sup>84</sup>

The Board has recognized the principle that a zoning by-law ought to regulate land use and not sterilize it. Thus, the Board has not approved the 'freezing' of land for an indeterminate time to the detriment of property owners.<sup>85</sup> Similarly, the Board has held that the purpose of designating lands for park purposes on an Official Plan is to give the governmental body an opportunity to purchase the lands from the private land-owners. Where such body either neglects or declines to purchase the property, then the land-owner is entitled to a zoning that allows for development.<sup>86</sup>

In *Re Twp. of Kingston O.P.*, residents wanted a park designation retained although no public authority was willing to purchase the lands. The Board stated: "... as a general principle, the Board has consistently held that to adopt such a policy would amount to confiscation without compensation".<sup>87</sup> This principle was also recognized in *Re City of Brockville By-law 44-72*:

Privately owned lands are not in the public domain. Until such time as they are acquired there is no right of the public to deny an owner the reasonable use of his lands in accordance with planning principles which have been determined and adopted by the duly elected representatives of the people, which action already implies consideration of the rights of the public.<sup>88</sup>

The Board has from time to time made comments on the evidence of expert planners and has relied upon the evidence given by the professional planners. Moreover, the Board has recognized that it must choose among conflicting professional planning opinions.<sup>89</sup> The Board has also indicated that it regards it to be a duty of a municipal council to seek proper planning advice. In the City of Toronto 45 foot height by-law case, the Board commented on the role of a planner employed by a municipality:

It is our view that the chief planner should be the guiding light to the Planning Board, whose chief duties are set forth in s. 12 of the Planning Act . . . . It would

<sup>83</sup> *Re City of Toronto and Metro Library Board* (1975), 4 O.M.B.R. 120.

<sup>84</sup> *Re City of London By-laws C.P. 306 (dp) — 70* (1974), 3 O.M.B.R. 411 at 414. See, also, *Re Town of Oakville By-laws 1970-23* (1973), 1 O.M.B.R. 224; *Re Twp. of Down By-law 40 — 1973, 52 — 1974* (1975), 4 O.M.B.R. 462.

<sup>85</sup> *Acro Developments Ltd. v. Town of Burlington* (1973), 1 O.M.B.R. 405.

<sup>86</sup> *Re Town of Burlington Official Plan and By-law 400-3* (1973), 1 O.M.B.R. 344; see, also, the *Borough of Etobicoke Official Plan Amendment and By-law 3208*, *supra*, note 72 where a similar position was taken by the Board on a re-zoning application.

<sup>87</sup> (1973), 1 O.M.B.R. 341 at 343.

<sup>88</sup> (1974), 2 O.M.B.R. 343 at 345.

<sup>89</sup> *Re City of Toronto O.P.* (1973), 1 O.M.B.R. 481.



be a sad commentary on the profession of an urban planner if he conceived it as his duty to follow only the wishes of Council without regard to those standards expected of a professional planner. If a planner believes it to be his function only to act as agent for Council then the Board should not place any reliance on his testimony, based on his qualifications as an urban planner. At the very least, such evidence would be suspect.<sup>90</sup>

The Board has also on occasion commented on the degree of opposition by ratepayers. In *Re Borough of North York O.P. and By-law 23835*, the Board stated:

Perhaps the strongest point in favour of this development is that among 90 residents within 400 feet of the site only 2 now object and their objection is one that can be met by other means not related to this development.<sup>91</sup>

And in *Re City of Toronto By-law 258-71*, the Board noted:

. . . as far as the vast majority of those residents is concerned, this matter [St. James Town] is of little concern to them — at least not of such a degree as to require the effort to write a letter or appear before the Board.<sup>92</sup>

### 3. Section 42 — *Re-hearing*

A unique feature of an administrative tribunal is the power it may be given, through its enabling act, to re-hear a matter. One author observes:

The power to reconsider decisions is peculiar to tribunals. It is not found in the law courts. Its existence is the consequence of a general lack of provisions for appeal, particularly on questions of facts, from tribunals, and of the regulatory nature of most tribunals. In both respects the tribunals differ from the courts. The power to reconsider thus appears to be an appropriate means both for the correction of errors in the absence of an appeal and to permit adjustments to be made as changes in the regulated activity occur.<sup>93</sup>

The *Ontario Municipal Board Act* provides that "the Board may re-hear any application before deciding it or may review, rescind, alter or vary any decision, approval or order made by it".<sup>94</sup> The Act also provides, however, for rights of appeal. Questions of jurisdiction or law may be appealed with leave to the Divisional Court.<sup>95</sup> Decisions of the Board are reviewable by the Lieutenant-Governor in Council.<sup>96</sup>

The procedure for invoking a re-hearing is initiated by motion accompanied by supporting affidavit. In deciding whether to set down the motion, the affidavits should state a *prima facie* case. In a commentary on this, the Board has stated:

The affidavit is required to demonstrate that the application is not frivolous and to give at least the appearance of sufficient merit to warrant return of the motion.

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<sup>90</sup> *Re City of Toronto Official Plan Amendment 25 and By-law 348-73* (1974), 4 O.M.B.R. 221 at 228.

<sup>91</sup> (1973), 1 O.M.B.R. 70 at 72.

<sup>92</sup> (1974), 2 O.M.B.R. 243 at 245.

<sup>93</sup> R. F. Reid, *Administrative Law and Practice* (Toronto: Butterworths, 1971) at 103.

<sup>94</sup> *Supra*, note 6, s. 42.

<sup>95</sup> *O.M.B. Act, supra*, note 6, s. 95; *The Judicature Act*, R.S.O. 1970, c. 228, s. 17(2).

<sup>96</sup> *O.M.B. Act, Id.*, ss. 94, 95.

At the actual return the members seized can determine the manner in which the submissions and evidence in support might best be heard to ensure proper presentation by the parties. It is a usual procedure of the Board on these motions to hear *viva voce* evidence as to whether the motion may or may not be granted but not as to the merits of the case which would only be considered if the motion was granted.<sup>97</sup>

On the motion for review, the Board may hear *viva voce* evidence with the applicant proceeding first. When the grounds for review warrant a re-hearing, the motion will be granted. The Board will not hear a motion for review while an appeal is pending, nor will a review be granted when a prior decision of the Board is confirmed by the Cabinet.<sup>98</sup>

The scope of s. 42 has received consideration in the courts. The decision in *Re Merrens et. al. v. Municipality of Metropolitan Toronto*<sup>99</sup> held that the power is not merely curative, but permits review in the light of facts which develop subsequent to the original order. There the Board had unconditionally approved an application to construct an expressway. The application for review did not allege any jurisdictional defect or faulty procedure emanating from the original order, yet the court considered the Board to have the power to permit review in the light of facts as they later developed. The section was held to be sufficiently broad to enable the Board to hold a re-hearing to determine whether or not the expressway should proceed, or alternatively, to alter its order of approval so as to prevent the construction of the expressway. The court was careful, however, to distinguish *Re City of Brantford v. Bray*<sup>100</sup> by stating:

... the court did not make an absolute statement that the Board has no power to review following an unqualified approval: it said that no power existed where *contractual* rights would be interfered with or that any such power ought not to be assumed in the circumstances.<sup>101</sup>

A more restrictive interpretation of s. 42 emerges from *Re Martin and County of Brant*. There, a person whose land had been expropriated pursuant to *The Highway Improvement Act* failed to appeal in time the determination of compensation by the Board. Subsequently, the claimant sought a review of the Board's decision pursuant to s. 42. The Board's decision to grant the review was appealed by the municipality and the court set aside this decision. Brooke, J.A. stated:

It will be observed that as a consequence of Section 95 and Section 42, decisions of the Board pursuant to its original jurisdiction conferred upon it by the Ontario Municipal Board Act are save as to questions of law and jurisdiction, reviewable by and only by the Board itself. This is an unusual jurisdiction to sit in review of or on appeal from its own decisions and it is a jurisdiction which in my own opinion, is to be construed strictly and not liberally.<sup>102</sup>

It is submitted that Brooke, J.A. may be incorrect in describing s. 42 as

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<sup>97</sup> *Re City of Toronto R.A. By-law 152-68* (1973), 1 O.M.B.R. 257 at 260.

<sup>98</sup> *Re Township of Goulbourn R.A. By-law 25-1971* (1973), 1 O.M.B.R. 181.

<sup>99</sup> [1973] 2 O.R. 265.

<sup>100</sup> (1972), 26 D.L.R. (3d) 129; [1972] 2 O.R. 525.

<sup>101</sup> *Supra*, note 99 at 524.

<sup>102</sup> (1970), 1 O.R. 1 at 4.

an "unusual jurisdiction". In *Merrens*, the court reviewed similar re-hearing powers in other statutes and observed: "There are many instances in administrative law of boards and tribunals given powers of reconsideration and re-hearing."<sup>103</sup> Moreover, it is well to remember that while one may go to the Divisional Court on a question of law and to the Cabinet on a question of policy, s. 42 is the only vehicle to allow a reconsideration of questions of fact.

In general, the grounds for a s. 42 review can be broadly classified as: (1) procedural defects, (2) error in the previous decision, and (3) changed circumstances or new evidence.

The Board has granted a re-hearing where requirements of fair notice and hearing have not been adhered to. For example, the Board has ordered the review of a by-law which was approved by it in the belief that all owners affected had consented. In fact, an objection filed with the clerk of the municipality had been inadvertently overlooked.<sup>104</sup> In *Re Township of North York By-law 14067*,<sup>105</sup> the Ontario Court of Appeal held that s. 42 gave the Board jurisdiction to rescind its approval order of an *ex parte* application and to determine the matter upon the giving of proper notice for a fresh hearing. In these circumstances, the court noted that the Board was not acting under s. 42 but proceeding upon a fresh application for approval. In that case, the Board had approved a zoning by-law. Subsequently, the approval was rescinded because opponents of the by-law failed to appear at the hearing owing to a mistake as to its date. Jurisdictional defects which have been raised as grounds for a re-hearing include improper notice and improper withdrawal of objections.<sup>106</sup>

It should be noted that jurisdictional defects or a denial of natural justice are reviewable by a court. In *Merrens*, the court observed that these errors are more appropriately corrected through the appeal procedure. It is clear, however, that s. 42 will not apply when one can appeal on the merits under the relevant statute.<sup>107</sup>

Error in a previous decision was asserted as a ground for re-hearing in *Re Walter Perks and County of Grey Land Division Committee*.<sup>108</sup> A motion for review of a decision denying consent to a severance was allowed subject to certain conditions being fulfilled within three months. The sole ground for the review was that the prior decision of the Board was in error. There was no new evidence, no changed circumstances, and no procedural defects alleged. The prior decision found that the proposed severance was premature as it was not in accordance with the Official Plan in a zoning by-law. The

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<sup>103</sup> *Supra*, note 99 at 526.

<sup>104</sup> *Re Town of Napanee and the Construction of Watermains on Centre Street E.* 74726 June 25, 1975.

<sup>105</sup> (1960), 24 D.L.R. (2d) 12; [1960] O.R. 374.

<sup>106</sup> *Re City of Toronto R.A. By-law 152-68* (1973), 1 O.M.B.R. 257; *Re City of Hamilton R.A. By-law 70-141* (1973), 1 O.M.B.R. 381.

<sup>107</sup> *Re Martin and County of Brant*, *supra*, note 102.

<sup>108</sup> Unreported, A 7436, April 2, 1975.

applicant stated at the motion, as well as at the prior hearing, that relevant authorities had agreed to amend the Official Plan and by-law. The motion for the re-hearing was denied, but the Board stated that if the Official Plan and by-law were amended within three months, the Board would grant a review.

Changed circumstances have been successfully asserted as a ground for review. In *The Township of Caledon*, the Minister of Municipal Affairs moved for a review of an order approving an Official Plan. Seven days subsequent to the approval order, the Toronto-Centred Region Plan, an official statement of government policy, was announced. The Township of Caledon was affected by the regional plan. In granting the review, the Board commented:

... one of the reasons for invoking section 42 under which the present application for review is made should be so as to effect a variance because of circumstances which have changed since the first order was made, especially if the lapse of time is short. The decision in *Scarborough v. Toronto* (1956), 3 D.L.R. (2d) 255, [1956] SCR 450 would seem to permit the Board to make a new order based on the circumstances as they exist on the date of the making of the new order.<sup>109</sup>

Absolute orders of the Board have also been the subject of a s. 42 re-hearing.<sup>110</sup>

The Board has itself outlined criteria to be relevant in determining whether to grant a re-hearing:

One ground for the granting of the application, in our opinion, would be if, on the face of the decision itself, there is a manifest error. Another ground that would be justification for a review would be that the hearing was not a proper one in the first instance. There is still a third ground which is sometimes relied upon and to which this Board have given effect for a new hearing and that is, that evidence which was not available at the previous hearing might now be properly adduced and further, that such evidence is likely to produce a different result.<sup>111</sup>

This would appear to be entirely consistent with the scope of the re-hearing jurisdiction as discussed in *Merrens*, and supported by a recent decision of the Divisional Court in *Davisville Investment Co. Ltd. v. City of Toronto*.<sup>112</sup>

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<sup>109</sup> (1974), 2 O.M.B.R. 1 at 4.

<sup>110</sup> *Re Minister of Transportation & Communications for closing of certain roads in the Borough of Scarborough* M741 March 13, 1975.

<sup>111</sup> *Re Appeal by Glen Forest Construction Co. and Town of Burlington*, P. 8916-69.

<sup>112</sup> Unreported, dated March 10, 1976.

